

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1311

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v

MARC RAUCH, SOL RAUCH and
LAWRENCE CORSA,

Appellants.

On Appeal From the United States District
Court For the Eastern District

PETITION FOR REHEARING WITH A
SUGGESTION FOR REHEARING EN BANC
ON BEHALF OF APPELLANTS MARC RAUCH
and LAWRENCE CORSA

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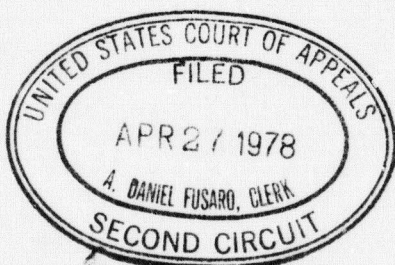


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UNITED STATES COURT OF APPEALS
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-----x
UNITED STATES OF AMERICA,

Appellee,

-v-

Docket No. 77-1311

MARC RAUCH, SOL RAUCH and
LAWRENCE CORSA,

Appellants.
-----x

PETITION FOR REHEARING WITH A
SUGGESTION FOR REHEARING EN BANC
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AND LAWRENCE CORSA

TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

On April 13, 1978 this Court affirmed the Eastern District mail fraud convictions of appellants Marc Rauch, Lawrence Corsa and Sol Rauch. The panel (Mulligan, Gewin, 5th Cir., and Miller, CCPA) wrote a three paragraph per curiam opinion (App. A hereto) merely listing the claims of the various appellants without reason or explanation, finding none of them error.

We file this petition for rehearing but more importantly for an en banc because our appeal raised a clearly meritorious joint representation issue. The panel's rejection of that issue drastically departs from numerous

contrary Second Circuit decisions and the Supreme Court's recent reversal in Holloway v. Arkansas, 46 U.S. L. Week 4289 (April 3, 1978).

The facts, not disputed, are as follows:*

1. Sol Rauch, Marc Rauch, his son, and Corsa, his son-in-law, were all involved in selling rare coins for investment in 1973 and 1974 through representations about the size and reliability of their company Federal Coin Reserve which the jury's verdict establishes as fraudulent. Marc Rauch and Corsa, both then twenty-one, handled the company's day to day affairs such as buying coins from dealers, attending conventions and so on. The Government claimed, however, and the jury found, that Sol Rauch exerted the real power in the company. He directed meetings, crucial policy decisions and other essential matters usually reserved for a company's highest officers.

* Notwithstanding 197 pages in the parties' Briefs, the panel wrote no decision narrowing the legal dispute or demonstrating its reasoning to the rest of the Court although an en banc application was bound to ensue the panel's refusal to follow, let alone discuss, possibly this Circuit's strongest line of cases, receiving the concurrence of every member of this Court. Our Brief before the panel has a full statement of the facts and the supporting transcript references. Because the facts cannot be disputed, however, we omit such references here.

2. In December 1974 the SEC sued Federal Coin, the Rauches and Corsa in the Southern District of New York to enjoin them from selling coins for investment without SEC registration, and for appointment of a receiver. This proceeding was also against Brigadoon Scotch, another Sol Rauch operation selling interests in barrels of scotch, antedating Federal Coin but after which Federal Coin was patterned. Sol Rauch hired and paid Samuel Goldman, Esq. to represent himself, his son and Corsa. Judge Lasker granted a preliminary injunction, 388 F.Supp. 1288, effectively stopping Federal Coin's business. Although Federal Coin then agreed to a receiver's appointment, ending the action as to it, the proceeding continued against Brigadoon and Sol Rauch, and Goldman continued to present Sol Rauch on that.

3. An Eastern District grand jury then inquired into the Government's charges of criminal mail fraud. Goldman, paid by Sol Rauch, again represented both Rauches and Corsa. The Government candidly admitted that its principal target was Sol Rauch. He had been convicted of fraud in Canada although an appellate court later reversed and he successfully fought re-extradition; he had been charged with wrongdoing in relation to Brigadoon Scotch, although assertedly avoiding criminal charges because of the statute of limitations; and he allegedly directed Federal Coin. It was also clear from this history that Sol Rauch faced the heaviest sentence if convicted, as indeed later turned out to be the case.

4. Sol Rauch's position from the outset was that Federal Coin had been the exclusive province of his son Marc and Corsa, that he had nothing to do with its affairs except give advice from time to time as its attorney, and that the boys, as they were called throughout the trial, had done nothing wrong. His position therefore placed the blame for any wrongdoing, if it existed, fully on Marc and Corsa, raising a clear conflict between him on the one hand, and Marc and Corsa on the other. The conflict also existed, however, and just as fundamentally, with respect to their positions. Both Brigadoon and Federal Coin were subsidiaries of Hartford Chemical Company, owned partly by Sol Rauch's brother, which sold office building supplies by phone. In addition to his activities for Brigadoon, Sol Rauch was the attorney for Hartford. It was Hartford which set up Federal Coin with the aid of Paul Lipton, and it was Lipton who prepared a white-covered brochure which contained the representations about Federal Coin/^{litigated at the trial.} In fact Marc and Corsa did not even join Federal Coin until six months later when Lipton resigned, and then to run the day to day operations along a pattern already clearly defined by others. Sol Rauch, moreover, may have said that he had nothing to do with Federal Coin. The Government, however, had proof to the contrary, and it was enough to prevail at the trial and ultimately on the appeal.

Given that Federal Coin's fundamental problems preceeded their arrival there, and that the Government placed Sol Rauch at Federal Coin's policy-making center, Marc and Corsa's best line of defense was to face squarely up to the misrepresentations problems, show that their origin lay with Lipton, and argue that the unsophisticated twenty-one year olds' failure to correct them may have been stupid but not criminal. There was after all a fifty four year old experienced attorney and businessman, to wit Sol Rauch, around on whom they could rely in such matters. Of course, that defense posed serious problems for Sol Rauch since his connection with Hartford and therefore Federal Coin covered Lipton's tenure and because it was squarely at odds with his own posture that apart from isolated attorney advice he had nothing whatsoever to do with Federal Coin.

5. Sol Rauch's interests and position dominated the defense. Goldman did not want defendants to testify before the Grand Jury. Sol Rauch, on his "the boys did nothing wrong" theory, thought otherwise. The three then gave Grand Jury testimony with Goldman's approval, although represented there by Sol Rauch. The Government later used Marc Rauch's grand jury testimony at trial with devastating effect. See the Government's Brief, pp. 15-16. Goldman never even explored, let alone presented, Marc and Corsa's line of defense outlined above.

6. On August 18, 1976 Sol Rauch requested and was granted permission to represent himself at the trial. Although Goldman then in form represented only Marc and Corsa, his actions at trial were equally as much on the pro se Sol Rauch's behalf, by whom, we should add, he was being paid. The bulk of Goldman's opening was that Sol Rauch was innocent, that he signed no checks or letters and handled no matters except for one or two complaints, that he received only \$11,000 in legal fees compared to Marc's \$14,000 salary, and that if convicted he would be disbarred and ruined for life. Goldman attempted to establish that Government witnesses and some of his own had no dealings with Sol Rauch. He extensively cross-examined, openly on Sol's behalf, one witness, who said Sol approved all Federal Coin travel bills, although the witness said nothing to harm Marc. Another witness, who worked for Federal Coin, testified that Sol ran the policy meetings and had the final word on a blue-covered brochure edited by Marc and Corsa to replace the white brochure. Since the Government relied heavily on the blue brochure to show Marc and Corsa's knowledge of the fraudulent misrepresentations, that testimony was most helpful and dovetailed perfectly with the available argument that the twenty-one year Marc and Corsa were not sufficiently aware of these matters to have intended fraud. Goldman, however, vigorously challenged the witness, examining over several pages to establish that everything emanated from

Marc and Corsa and that they not Sol, made the decision on the brochure. Goldman brought out at the same time that his clients, not Sol, handled complaints from customers about which the Government made much in its proof.

Goldman's aid to Sol Rauch was but the opposite side of Sol Rauch's constant interjection of himself on behalf of Marc and Corsa, as witness and as attorney. The net result was that Marc and Corsa's defense was directed and presented on the one hand by Marc's father, who had deep conflicting interests, and on the other hand by Goldman, who as the only experienced practitioner, more and more defended the pro se father, so that in fact, if not in form, he was at the trial Sol Rauch's attorney as well.

7. The jury convicted Sol, Marc and Corsa of all the mail fraud counts submitted to them. Corroborating our point that Sol was the principal defendant the district court sentenced him to three years confinement. Marc and Corsa each received six months. Sol in addition must pay a \$14,000 fine, Marc and Corsa \$2800 each.

POINT I

MARC AND CORSA DID NOT RECEIVE
REPRESENTATION FREE FROM CONFLICTING
INTERESTS IN VIOLATION OF THE SIXTH
AMENDMENT.

Few rights have been more solicitiously protected in this Circuit (including heretofore by the only Second Circuit judge who sat on the panel) than the Sixth Amendment guarantee to an attorney with undivided loyalties. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976); United States v. Bernstein, 533 F.2d 775, 787-88 (2d Cir. 1976); Abraham v. United States, 549 F.2d 236 (2d Cir. 1977); United States v. Mari, 521 F.2d 117 (2d Cir. 1975); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973); United States v. Lovano, 420 F.2d 769 (2d Cir. 1970); United States v. Alberti, 470 F.2d 878 (2d Cir. 1972); Morgan v. United States, 396 F.2d 110 (2d Cir. 1968).

The Circuit's requirement that there be prejudice or a real conflict may indeed have to be re-examined -- Judge Oakes so suggested in United States v. Mari, supra -- especially in light of the Supreme Court's broad statements in support of the right in Holloway v. Arkansas, 46 U.S.L. Week 4289 (April 3, 1978). This case, en banc, is appropriate for the re-examination. Even under this Court's now prevailing rule, however, the panel had a clear case for reversal.

First, there is the question that Goldman had loyalties to Sol Rauch. He was paid by Sol Rauch, he earlier represented Sol Rauch in the criminal trial, and he continued to represent Sol Rauch in the SEC Brigadoon proceedings in the Southern District. To lay to rest any questions on that we annex as Appendix B Judge Lasker's June 16, 1977 opinion in Brigadoon (post-dating the criminal trial), detailing Goldman's continuing efforts there for Sol Rauch, including "behavior . . . border[ing] on the contemptuous" (footnote 3). The record is plain moreover that at the trial Goldman in fact even if not in form represented Sol Rauch, so that no matter what the formalities, this is a joint representation case.

Second, at no point did the district court explore the conflict issue with Marc, neglecting a duty mandated by the decisions and taking from the case any issue of waiver, Holloway v. Arkansas, supra, or election. Kaplan v. Bombard (2d Cir. Feb. 15, 1977.) On August 18, 1976 Sol Rauch used the fact that there might be a conflict between him and Marc to obtain permission to represent himself. The district court made no inquiry into whether Goldman's representation of Marc indeed permitted him to represent Sol as well, merely remarking that Rauch did not even need permission to proceed pro se. Certainly the court did not question then or at any time whether Goldman's loyalties to Sol, including from his role as Sol's attorney in the Southern District Brigadoon action, allowed him to represent Marc.

Third, the conflict was real and caused demonstrable prejudice. (Because the district court made no inquiry on the conflict issue, the burden on this point was the Government's, United States v. Carrigan, 543 F.2d at 1056; Kaplan v. Bombard, supra). Marc and Corsa's positions could not have been more diametrically opposed to Sol's. Sol cast blame for everything on Marc and Corsa as part of his defense, although arguing that they did nothing wrong. Goldman gave them no protection from this. Indeed he advanced the same theory himself, wholly failing to explore on their behalf the best defense -- that the fault was at the higher levels, not with them.

There was further prejudice from the posture this representation presented to the jury. Sol Rauch did an awful job at trial. The jury rejected him as a credible witness, the district court gave him a three year sentence based on the "considerable opportunity [it had] to view Mr. Rauch . . . as a witness [and] as an attorney", and Rauch candidly admitted at sentencing that "I was terribly emotionally involved in the case, and I should have had an outside attorney [and] I don't think that I received, because of myself primarily, a proper and fair trial". It hardly benefitted Marc and Corsa to have Sol Rauch as attorney repeatedly purporting to talk for them, United States v. Sacco, 563 F.2d 552 (2d Cir. 1977),

or to have their attorney Goldman arguing equally for Sol Rauch.

Finally, we were present at the March 28, 1978 argument before Judges Feinberg, Mansfield and Oakes of Salomon v. LaVallee, No. 77-2143, another joint representation case. Whether that panel ultimately affirms or reverses, its probe of the issues on oral argument evidenced a willingness to accord the Sixth Amendment right a consideration this panel denied, but one now even more clearly mandated by Holloway v. Arkansas. There should be a uniformity of such consideration in the same Circuit, especially when, as here, the potential (and ultimate realization) for the father's conflict position dominating the young son and son-in-law's was so great.

POINT II

THE DISTRICT COURT'S FAILURE TO
DESIGNATE REGULAR AND ALTERNATE
JURORS AS SUCH UNTIL THE END OF
THE TRIAL VIOLATED RULE 24.

We raised before the panel the district court's violation of F.R.Crim. P. 24 in its method of jury selection. Pages 27 through 30 of our Brief below fully treats the issue and we include it as Appendix C and adopt it here. The point furnishes further reason for the en banc because Eastern District judges are disregarding the rule on an apparent wholesale basis with improper and prejudicial consequences to the parties.

POINT III

MARC RAUCH AND CORSA RELY ON
POINTS RAISED BY CO-APPELLANT
TO THE EXTENT APPLICABLE

CONCLUSION

Holloway v. Arkansas was decided after the oral argument and not called to the panel's attention by the parties. That decision furnishes ample basis for the panel to re-consider the conflict of interest issue and upon such re-consideration to reverse as to Marc and Corsa.

Barring that, the Court should grant en banc and
sitting as a full court reverse.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 744, 773, 774—September Term, 1977.
(Argued March 13, 1978 Decided April 13, 1978.)
Docket Nos. 77-1311, 77-1312, 77-1321

UNITED STATES OF AMERICA,

Appellee,

—against—

SOL R. RAUCH, MARC RAUCH
and LAWRENCE CORSA,

Appellants.

Before:

MULLIGAN and GEWIN,* *Circuit Judges,*
and MILLER,** U.S. Court of Customs
and Patent Appeals.

Appeal from a judgment of the United States District
Court for the Eastern District of New York convicting
appellants, after a jury trial before George C. Pratt, *Judge,*
of 14 counts of mail fraud, in violation of Title 18 U.S.C.
§§ 1341 & 2.

Affirmed.

* Of the United States Court of Appeals for the Fifth Circuit, sitting
by designation.

** Of the United States Court of Customs and Patent Appeals, Washing-
ton, D.C., sitting by designation.

JOSEPH P. HOEY, Esq., New York, N.Y. (Brady, Tarpey, Hoey, New York, N.Y., Michael W. O'Sullivan, Richard D. Furlong, New York, N.Y., of counsel), *for Appellant* (S. Rauch).

DONALD E. NAWI, Esq., New Rochelle, New York, *for Appellant* (M. Rauch).

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GARY A. WOODFIELD, Special Assistant to the United States Attorney, New York, N.Y. (David G. Trager, United States Attorney for the Eastern District of New York, Harvey M. Stone, Thomas D. Sclafani, Assistant United States Attorneys, of counsel), *for Appellee*.

PER CURIAM:

Appellants Sol R. Rauch, his son Marc Rauch, and his son-in-law, Lawrence Corsa, were jointly tried and convicted by a jury of 14 counts of mail fraud. Their convictions arose out of the operation of a mail order business, Federal Coin Reserve, Inc., which sold rare coins for investment purposes. Marc Rauch was president of the company, Lawrence Corsa was vice-president, and Sol Rauch was its attorney.

On appeal each defendant specifies a number of errors, some of which are similar, which they contend require reversal of their convictions: (1) the evidence was insufficient; (2) the charge to the jury was inadequate; (3) a conflict of interest occurred when counsel for Marc Rauch and Lawrence Corsa assisted the pro se defense of Sol

Rauch; (4) the court failed to designate regular and alternate jurors until the end of trial; (5) there was prosecutorial misconduct; (6) requested instructions were not given; (7) the trial court "coerced" Corsa into waiving indictment and proceeding by information; (8) the court improperly amended the indictment; and (9) the judge made erroneous evidentiary rulings.

We have examined the briefs and the record and given close attention to appellants' claims at oral argument but conclude that no error requiring reversal was committed. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States*, 344 U.S. 604, 619, 73 S.Ct. 481, 490, 97 L.Ed. 593, 605 (1953). While the evidence against each party was not of equal weight, there was sufficient evidence as to each appellant to support the jury's verdict.

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APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff,

74 Civ. 5422

-against-

MEMORANDUM

BRIGADOON SCOTCH DISTRIBUTORS,
LTD., et al.,

Defendants.
-----X

46032

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MICROFILM

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cf.

LASKER, D.J.

This motion to hold Sol Rauch (Rauch) in civil and criminal contempt and for costs pursuant to Rule 37(d), Fed. R. Civ. P., grows out of the extended labors of James Schreiber, court appointed Receiver of Brigadoon Scotch Distributors, Ltd. and related corporations (the Brigadoon businesses), to obtain information from Rauch with regard to the Brigadoon businesses. The current episode began on March 24, 1976, when Schreiber served a set of disgorgement-related interrogatories on Rauch and his attorney, Samuel Goldman (Goldman)^{1/}. Since late July, 1976, the controversy over these interrogatories has focused on Rauch's assertion of a fifth amendment privilege, first, with regard to questions related to a corporation which relatives of Rauch control, Federal Coin Reserve, Inc. (Federal Coin) and later, after the privilege as to Federal Coin was sustained, with regard to questions focusing on the affairs of Brigadoon.

Rauch's fear of possible criminal prosecution for his activities in the Brigadoon businesses is not imaginary. Since his original assertion of his Fifth Amendment rights in this proceeding on July 22, 1976, he has been convicted after a jury trial in the Eastern District of New York on charges growing out of the business affairs of Federal Coin. In the Spring of 1976 both he and his son Marc, who was

convicted in the same trial, testified before the grand jury investigating the operations of Federal Coin. Rauch was informed at the time only that Federal Coin was a target, but his son was told that the grand jury was investigating the affairs of Brigadoon as well.

Despite these facts, Schreiber vigorously contends that Rauch has waived or lost whatever Fifth Amendment privileges he may once have had, both by untimely assertion and by giving testimony as to Brigadoon on several prior occasions. There is a great deal of merit to the first argument.^{2/} Putting to one side the question whether Rauch's son specifically informed him prior to the hearing on September 8, 1976, of the prosecutor's statement that Brigadoon was a target of the grand jury probe (as to which we are inclined to credit Rauch's testimony that he was not so informed), the very fact that Federal Coin was under investigation should have been enough to alert one in Rauch's shoes to the possibility of criminal charges stemming out of any part of the Rauch-Brigadoon businesses. Moreover, Rauch did not assert his Fifth Amendment right as to any of the interrogatories until late July, 1976, four months after they had been propounded. Prior to this time, Rauch objected to the questions on the simple ground that they had been asked and answered in depositions taken at a previous date. The Fifth Amendment privilege

can be lost by failure to assert it promptly, Garner v. United States, 424 U.S. 646, 654 n.8 (1976), or when raised as a "pure afterthought." Rogers v. United States, 340 U.S. 367, 371 (1951). In short, it is far from certain that Rauch's Fifth Amendment privilege has not been lost in the circumstances of this case.^{3/} However, given the gravity of such a conclusion for Rauch, and the distinct possibility that the history of his responses to these interrogatories to date may not have been the product so much of guile as of opacity, it is desirable to avoid reaching this conclusion if possible.

At the hearing on May 5th, Schreiber suggested that his purposes would be satisfied if Rauch were to provide answers to the interrogatories which would be sealed and subject to a protective order forbidding disclosure by anyone connected with this case, and particularly forbidding their direct or indirect use in any criminal investigation. The court indicated that it was favorably disposed toward this suggestion and solicited responses from Goldman and Rauch. Rauch, himself an attorney, stated that such a procedure would be agreeable to him. (Tr. 28) Goldman made no such statement at the time, but was given a week to study the matter and indicate objections to Schreiber's proposal. His response, however, by letter of May 11, 1977, makes no reference to this issue. It simply recites

the position he has taken throughout.

In the circumstances described, it is appropriate to require Rauch to respond to the interrogatories subject to a protective order and a sealing requirement. There is a strong public interest in facilitating the prompt resolution of the Receiver's work which militates against staying further discovery from Rauch pending the resolution of any criminal actions against him or the expiration of the limitations period. See Paul Harrigan & Sons v. Enterprise Animal Oil, Inc., 14 F.R.D. 333 (E.D.Pa. 1953). Further, there is every reason to believe that Rauch can be fully protected from the improper use of his responses, especially since the party obtaining discovery is not a part of the government. Compare, e.g., United States v. Kordel, 397 U.S.1, (1970). Finally, although they have been given ample opportunity, neither Rauch nor his attorney have come forth with any reason why this procedure should not be employed, and indeed, Rauch himself has made plain his willingness to cooperate.

For the foregoing reasons, the motion to hold Rauch in contempt is denied, subject to Rauch's response to the interrogatories within twenty days after the signing of a protective order. The motion for costs is denied. A serious Fifth Amendment question has been raised, however problematic the outcome or inept the presentation to the court.

Hence, the assertion of the privilege must be deemed "substantially justified" within the meaning of Rule 37(d).

Submit orders on notice.

Dated: New York, New York
June 16, 1977.

Monroe E. Carter
U.S.D.J.

FOOTNOTES

1. The history of Schreiber's efforts to obtain answers to the interrogatories is set forth in detail in the Affidavit of Michael Hirschberg of November 11, 1976, supplemented by Hirschberg's letter to the Court of February 4, 1977 and the transcripts of the hearings held in this matter on September 9, 1976, December 13, 1976 and May 5, 1977.
2. It is impossible to determine whether the privilege has been lost on account of the previous testimony without examining both the earlier testimony and the proposed questions. If the latter relate to a new subject matter or call for responses which may expand on whatever possible crimination may lie in Rauch's previous responses, the privilege could still be asserted. McCarthy v. Arndstein, 262 U.S. 355 (1923).
3. The conduct of both Rauch and Goldman in the litigation of this and other matters arising out of the Brigadoon receivership lends further credence to Schreiber's contention that the privilege is being asserted now as an afterthought. Their behavior has been marked by efforts to obstruct and delay the proceedings. Repeatedly, they have declined to provide responses to motions, letters from opposing counsel or requests for information from the court until specific requests for such responses have been made by chambers, and even then, more than one deadline has often passed before the receipt of the information requested. More serious, this type of conduct has typified their response to the receiver's discovery requests and greatly impeded his task. In short, their behavior itself borders on the contemptuous, and detracts substantially from assertions of sincerity and good faith in the instant application.

APPENDIX C

POINT II

THE DISTRICT COURT'S FAILURE TO DESIGNATE REGULAR AND ALTERNATE JURORS AS SUCH UNTIL THE END OF THE TRIAL VIOLATED RULE 24

We understand that certain judges in the Eastern District choose a jury panel without specifically designating which jurors are regulars and which alternates. That comes only when the jury retires to deliberate.

The practice was followed here. Fourteen jurors were chosen without specific designation. At the end of the case defendants were to designate one as an alternate and the Government the other. If there were only thirteen, the alternate would be chosen by lot (3422).

The practice, we submit, clearly violated F.R.Crim.P. 24, and that violation had specific adverse consequences for these defendants.* Thus, when the evidence was over the panel had

* Rule 24(c) provides in pertinent part:

The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

The plain command is that regular and alternate jurors are to be designated as such at the outset, and that alternates replace regular jurors "in the order in which they are called."

Rule 47(b) of the Federal Rules of Civil Procedure is to the same effect.

only thirteen jurors, one having been excused earlier. Before summations Juror No. 2 told the court he was scheduled to take his mother to the doctor the next day and had already postponed the appointment twice (3413). The Government really did not want him excused (3414). Neither did defendants (3421). And although the juror was anxious to get the appointment over (3426), he regretted not sitting for the verdict (3428-29) and was prepared, if necessary, to make other arrangements (3426). The court nonetheless excused him. It stated that someone was going to be excused at the alternate juror lottery the next day. Conceivably it might be Juror No. 2. It determined to avoid the lottery by excusing him right then and there (3425-26).

Immediately thereafter, however, with the jury now down to twelve, the court learned that earlier in the trial, when defendants had asked for but been refused a Government concession that Corsa was a coin expert (3223), Juror No. 3 had said: "I wouldn't [concede that] either" (3430). Defendants asked that the juror be excused or at least that inquiry be made (3433-34). They got neither. The court offered to discharge the juror and go forward with eleven if the Government agreed. Barring such agreement it would say nothing until the verdict was in (3437). The Government, however, refused to agree,* nothing

* Although at the outset of the trial the Assistant himself asked that defendants agree to a jury of eleven if that became necessary (4).

was said, either generally or specifically, and Juror No. 3 participated in the deliberations. On inquiry after her guilty verdict, she did not "believe" she said anything about Corsa's qualifications as an expert, and "to [her] mind" maintained an open attitude (3701-02). But something must have happened because her ultimate response was "I'm sorry about that" (3703). And while the court later found that she had not prejudged the evidence nor been biased, it refused to find that she had not made the remark (3705).

We can now draw conclusions about the district court's disregard of Rule 24.

First, had Kaufman, Juror No. 2, been designated a regular, as he should have been, defendants might not have lost him. The impetus to excusing him, as we have said, was the court's notion that someone had to be discharged, this might be Kaufman, so why not let him go. There would undoubtedly have been far more exploration of, and pressure for the "other arrangements" Kaufman was prepared to make, had he been a regular juror.

Second, the unauthorized procedure obliged defendants to go to verdict with Juror No. 3. With Kaufman gone and the jury down to twelve, the Government was in a position to refuse a verdict by eleven, effectively forcing the court to retain a juror who might have already made up her mind in the Government's favor.*

* Compare United States v. Banks, 383 F.Supp. 389, 396-97 (D.S. Dakota 1974) (misconduct for Government to refuse to agree to jury of eleven to force retrial to correct errors in earlier trial).

Moreover, as a direct result of the impasse, the district court deferred until after verdict its inquiry into her remark. Even with wide discretion to inquire generally of the panel or specifically of Juror No. 3, the inquiry had to be made before the jury retired to avoid the problem juror's infecting the entire deliberation. Marshall v. United States, 360 U.S. 310 (1959); Mares v. United States, 383 F.2d 805 (10th Cir. 1967). Finally, once the guilty verdict was returned the juror had a vested interest in protecting it, as shown by her attempt to imply that she had not made the disputed statement but her failure categorically to deny it, and her eventual apology, confirming that indeed she had.

These points are not lost because defendants agreed to the improper jury selection. Rule 24 is mandatory. The district court may not change its provisions even with the parties' consent. United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964); United States v. Allison, 481 F.2d 468 (5th Cir. 1973). And where the rule has been violated, with a demonstrable result on the composition of the panel, there must be reversal no matter how strong the Government's evidence. United States v. Virginia Erection Corp., 335 F.2d at 873; United States v. Beasley, 464 F.2d 468 (10th Cir. 1972); United States v. Hayutin, 398 F.2d 944, 950-51 (2d Cir. 1968); United States v. Nash, 414 F.2d 234 (2d Cir. 1969).

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

DONALD E. NAWI, being duly sworn, deposes and
says:

I am the attorney for appellant Marc Rauch and
have prepared this petition on behalf of him and his
co-appellant, Lawrence Corsa. I make this certificate
in compliance with the rules of this Court. In my judgment
the foregoing petition is well founded and is not frivolous
or interposed for delay.

Donald E. Nawi

Sworn to before me this

27 day of April, 1978.

Inez Babb

INEZ BABB
NOTARY PUBLIC, STATE OF NEW YORK
No. 24-0122040
Qualified in Kings County
Commission Expires March 30, 1979

CERTIFICATE OF SERVICE

DONALD E. NAWI certifies that on *April 27*, 1978
I mailed a copy of the Petition for Rehearing for appellants
Marc Rauch and Lawrence Corsa to David Traeger, Esq., 225
Cadman Plaza East, Brooklyn, New York, 11201, Brady, Tarpey,
Hoey, P.C., 84 William Street, New York, N.Y. 10038, attorneys
for appellant Sol Rauch and Jack Kaplan, 2 Wall Street,
New York, New York 10005, Attorney for Appellant Lawrence Corsa.

Donald E. Nawi
Donald E. Nawi